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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 650

LESTER ROTHSCHILD, INDIVIDUALLY AND TRADING AS GEN-O-PAK COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 156) is reported in 200 F. 2d 39.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1952 (R. 162) and not on

December 9, 1952, as petitioner alleges (Br. 5-6). The petition for a writ of certiorari was filed on March 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari was filed in time.

If question 1 is answered affirmatively, the following additional questions are presented:

2. Whether petitioner, in the conduct of his business of obtaining information about delinquent debtors, had engaged in unfair and deceptive acts and practices by representing that information about such debtors was sought to enable him to deliver packages or money being held for them, or to survey employment conditions, when in fact such information was sought to be turned over to their creditors.

3. Whether petitioner engaged in interstate commerce in conducting such business.

4. Whether the Commission was justified in prescribing the relief ordered as necessary to prevent continuation or repetition of petitioner's illegal practices.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or prac-

tices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

28 U.S.C., Supp. V, 2101 (c) provides as follows:

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT[1]

The Federal Trade Commission, after full administrative proceedings unchallenged as to regularity,[2] found that petitioner had engaged in unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, and entered a cease and desist order. On petition for review of that order, the Court of Appeals for the Seventh Circuit unanimously up-

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[1] The facts relating to the timeliness of the filing of the petition are set forth in the argument, *infra*, pp. 7-8.

[2] Hearings were held (R. 30-60) on the Commission's amended complaint (R. 13), the examiner filed an initial decision (R. 102), petitioner appealed therefrom to the Commission and filed a supporting brief (R. 115), and the Commission heard oral argument (R. 135).

held its validity. The material facts, as found by the Commission[3] and the court below, are as follows:

Petitioner sells services and literature used in obtaining information about delinquent debtors (R. 135, 139, 156). He supplies printed double post cards and letter questionnaires which he mails from Chicago, Illinois, to his customers located in various states (R. 103, 135-136, 146). These customers address the cards and letters to debtors or to persons from whom information about debtors is sought, and return them to petitioner in Chicago, who then mails them (R. 106, 136, 146). Upon return of the completed cards and questionnaires, petitioner forwards them to his customers (R. 142, 146).[4]

Petitioner operates under the names of Gen-O-Pak Co., The American Deposit System, and Manpower Classification Bureau (R. 138, 139). The Gen-O-Pak Co. furnishes two forms of return address double post cards. One form, which is sent to debtors, states that Gen-O-Pak is "holding a package which we will send to you" upon receipt

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[3] The Commission adopted the examiner's initial decision as its decision in the case (R. 137).

[4] The court below stated that petitioner's advertising in the leading collection magazine made it "obvious" that his post cards and letters were sold "for no other purpose than to aid in making collections from delinquent debtors" (R. 159). Examples of such advertisements are: "Your Debtors are Changing Jobs and Addresses, Too—What are YOU Doing About It? For CHEAP, Fast Information on NEW Jobs and NEW Addresses", use petitioner's services (R. 69); "COLLECTORS ATTENTION! TAKE THE 'ACE' OUT OF TRACE BY LETTING THE GEN-O-PAK TWINS DO THE WORK" (R. 73).

of the attached card "with complete identification filled in" (R. 139). The return card calls for the debtor to furnish his name and address, that of his bank, his employer and a friend, and miscellaneous descriptive information (R. 140). The second form of card—sent to persons other than the debtor—requests the debtor's address so that Gen-O-Pak may make delivery of a package which it has for the debtor (R. 140-141). Persons who return the completed cards receive from petitioner a small envelope containing three pen points valued at three cents, together with advertising matter (R. 142).

Under the name of The American Deposit System, petitioner sends out a form letter which states that if the addressee completes and returns it

> we will forward to you a small sum of money deposited with us, for you, for that purpose. All questions must be answered, so we can determine if you are the proper party. [R. 145.]

Upon receiving the completed letter, petitioner sends the addressee three cents (R. 146).[5]

Petitioner also sends out a form letter under the name of Manpower Classification Bureau. This letter requests that the inclosed questionnaire be completed "so that this Bureau can properly classify the kind of work you are best qualified to per-

[5] The three pennies, as well as the pens sent to Gen-O-Pak addressees, are included in the 15 cents petitioner charges for these services (R. 139). Petitioner charges 11 cents for the Manpower Classification Bureau questionnaire (R. 49, 158).

form" (R. 143-144). No property or money is offered to people who answer this questionnaire.

The Commission found that, through the use of the Gen-O-Pak cards, petitioner had falsely represented to his customers' debtors and others that such debtors were consignees of packages "of substantial value" which petitioner, in the usual course of his business, was holding for delivery but could not deliver "because of lack of identification or address" (R. 142-143); that the debtors were not such consignees (R. 143), but that petitioner had made up the packages (R. 136); that petitioner's business has nothing to do with the transportation or delivery of packages (R. 142-143); and that petitioner's "whole scheme" was that of "obtaining information by subterfuge" (R. 143). The Commission further found that the Manpower Classification Bureau letter falsely represented that petitioner was operating a labor classification bureau for the purpose of obtaining information as to manpower or employment situations in certain areas (R. 136, 147);[6] that the American Deposit System letter represented that a "reasonably substantial" sum of money had been deposited with petitioner for delivery to the debtor upon proper identification (*ibid*); and that petitioner's business, insofar as the recipients of these letters were concerned, "has nothing to do with manpower

[6] Petitioner testified that he "tabulated" the information obtained from the Manpower questionnaire, that he was "building up" a store of information for future sale to "large industrial users of labor," but that he had made no effort thus far to sell the data (R. 48-49).

classification or employment surveys and no money has been deposited" with petitioner for the debtors (*ibid*). The Commission concluded that the statements in the postcards and form letters had the "capacity and tendency" to "mislead and deceive" the recipients thereof, and to induce them to furnish information which they would not otherwise supply (*ibid*).

The Commission ordered petitioner to cease and desist from representing that money or property had been deposited and was being held by the debtors unless it had in fact been deposited and its amount or value was "accurately stated;" from using the names "Manpower Classification Bureau," "American Deposit System" or other words implying that petitioner's business was that of gathering and furnishing information relating to employment, or that of receiving and holding money; and from using any stationery in locating or collecting money from delinquent debtors unless the words "Collection Service" appeared immediately in conjunction with petitioner's actual or trade name (R. 137, 148-149).

ARGUMENT

I

On November 20, 1952—the same day on which its opinion was filed (R. 156)—the court of appeals entered a separate judgment (R. 162). This judgment "ordered and adjudged" that the petition to review "be denied, and the enforcement of the said order of the Commission is ordered"

(ibid). The petition for a writ of certiorari was filed March 9, 1953, more than 90 days after entry of that order. No rehearing was sought of the order, and no application for extension of time for filing the petition was made to a Justice of this Court. The petition was therefore untimely, and this Court is without jurisdiction to entertain it. 28 U.S.C. 2101(c).

Petitioner apparently assumed that the final decree sought to be reviewed is not the order of November 20, but a subsequent judgment entered on December 9, 1952 (R. 163; Br. 3, 5-6). We submit, however, that the second judgment "did no more than to restate what it [the court] had decided by the first one," and that the 90 day period for filing the petition ran from November 20. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. The judgment of December 9, after reciting the prior proceedings, ordered that the Commission's order "be and it hereby is affirmed and enforced," "commanded" petitioner to comply therewith (R. 163), and directed him to file the usual compliance report with the Commission. Neither these slight changes in language from the November 20 judgment, nor the additional provisions commanding obedience and the filing of a report of compliance, altered the substantive effect of the earlier judgment. The controversy between petitioner and the Commission over the essential validity of the Commission's order had been "plainly and properly settled with finality" on

November 20 when the court denied the petition to review and directed enforcement of the order. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212.[7]

In the *Minneapolis-Honeywell* case, *supra*, the court of appeals had entered on July 5 a judgment which reversed Part III of a Trade Commission order. On September 18 the court entered another judgment captioned "Final Decree" in which it repeated its reversal of Part III in the language of the earlier decree, and affirmed and enforced the other two parts of the order. The Government petitioned for certiorari, seeking review of only that portion of the order reversing Part III. The petition was filed more than 90 days after the first order, but within 90 days after the second order. This Court held that the petition was untimely. It pointed out that the controversy between the parties related only to matters which had been "put to rest" by the July 5 judgment, and that accordingly "we cannot ascribe any significance, as far as timeliness is concerned, to the later judgment" (pp. 212, 213). The Court deemed it immaterial that the later judgment was captioned "Final Decree," since "the question of whether the time for petitioning for certiorari was to be enlarged cannot turn on the adjective which the

[7] The court's subsequent order of December 12 (R. 165) merely stayed the mandate pending application for a writ of certiorari. Rule 25(b), Rules of the United States Court of Appeals for the Seventh Circuit.

court below chose to use in the caption of its second judgment" (p. 212).

We submit that similar reasoning compels the conclusion that the time for filing in the instant case was not extended by the December 9 judgment, and that the petition is untimely.

II

A. Petitioner contends that his practices were not unfair or deceptive because all of the statements in his postcards and letters were true (Br. 13). In the first place, as the Commission found, petitioner made a number of false statements. Thus, contrary to petitioner's representations, no sums of money had been deposited with American Deposit Co. for forwarding to debtors, Gen-O-Pak Company was not holding any packages which it was unable to deliver because of missing addresses, and the Manpower Classification Service was not seeking information from debtors in order to classify the kind of work they were best qualified to perform. But even assuming *arguendo* that petitioner's isolated statements were all literally true, that would not negate the Commission's finding of deception. For, as the court below pointed out, "Words and sentences may be literally and technically true, and yet framed in such a setting as to mislead or deceive." (R. 160). *United States* v. *95 Barrels of Vinegar,* 265 U.S. 438, 443; *D.D.D. Corp.* v. *Federal Trade Commission,* 125 F. 2d 679, 682 (C.A. 7); *Bockenstette* v. *Federal Trade Commission,* 134 F. 2d 369, 371 (C.A. 10); *Sebrone Co.*

v. *Federal Trade Commission,* 135 F. 2d 676, 679 (C.A. 7).

Had petitioner's cards and letters stated that the requested information was to be supplied to creditors, and that the benefit to be received upon completing the questionnaire was worth precisely three cents, we doubt that many of the addressees would have furnished the data. The substantial number of persons who completed the questionnaires [8] shows how effective petitioner's misleading and deceptive statements have been in inducing delinquent debtors unwittingly to provide their creditors with the information. Plainly, the overall effect of petitioner's literature was to mislead and deceive the recipients thereof, and to "trap delinquent debtors" (R. 160). [9] Contrary to petitioner's contention (Br. 11), the Act is intended to protect not just vendees, but the public generally, against deceptive practices. *Federal Trade Commission* v. *Klesner,* 280 U.S. 19, 27; see *Gulf Oil Corporation* v. *Federal Trade Commission,* 150 F. 2d 106, 108 (C.A. 5). [10]

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[8] In 1950 petitioner sold 44,253 sets of the Gen-O-Pak cards sent directly to debtors (R. 37, 157) and 28,486 American Deposit System letters (R. 43, 159). Approximately 30 percent of the Gen-O-Pak cards and 37½ percent of the American Deposit System letters were completed and returned to petitioner (R. 36, 47).

[9] The fact, pointed to by petitioner (Br. 14), that the Commission produced no witnesses to testify that they had been deceived is immaterial. *Bockenstette* v. *Federal Trade Commission,* 134 F. 2d 369, 371 (C.A. 10); *Charles of the Ritz Distributors Corporation* v. *Federal Trade Commission,* 143 F. 2d 676, 680 (C.A. 2).

[10] The Commission's power to prohibit "unfair or deceptive acts or practices," which was added to Section 5 by the

The Commission's power to proscribe similar "skip-tracer" schemes for obtaining information about delinquent debtors has been sustained by the courts of appeals for the Second,[11] Ninth,[12] and District of Columbia circuits[13]—all the other circuits in which this question has been litigated.

B. Petitioner further argues that he is not engaged in interstate commerce because he does no more than use the mails to request information. But "petitioner's services go beyond the mailing of a request for information" (R. 160). Petitioner also sends the cards and letters to his customers outside Illinois for addressing, forwards the completed questionnaires to them, and sends out the pen points and pennies to those answering the questionnaires. In short, petitioner's "skip-tracer" business is necessarily operated in interstate commerce. The fact that such business involves the use of the mails does not deprive the

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Wheeler-Lea Act (52 Stat. 111) in 1938, authorizes the Commission to stop practices "unfair or deceptive to the public generally * * *." S. Rep. No. 221, 75th Cong., 1st Sess., p. 2.

[11] *Dejay Stores* v. *Federal Trade Commission*, 200 F. 2d 865 (C.A. 2) (request for information from "Personnel Management Bureau"; package or letter being held for delivery).

[12] *Silverman* v. *Federal Trade Commission*, 145 F. 2d 751 (C.A. 9) ("General Forwarding System" holding prepaid package; "Commercial Pen Co." seeking to introduce pens on market); *Lipman* v. *Federal Trade Commission*, 148 F. 2d 823 (C.A. 9); *Bernstein* v. *Federal Trade Commission*, 200 F. 2d 404 (C.A. 9) ("Business Research, Washington, D. C." requesting information "to enable us to complete our records").

[13] *Bennett* v. *Federal Trade Commission*, 200 F. 2d 362 (C.A. D.C.) ("The National Service Bureau, Washington, D. C." will forward "check for a small sum of money deposited with us for you;" ten cent check sent).

Commission of jurisdiction. *Branch* v. *Federal Trade Commission,* 141 F. 2d 31, 34 (C.A. 7); *Progress Tailoring Co.* v. *Federal Trade Commission,* 153 F. 2d 103, 105 (C.A. 7).

C. Finally, petitioner argues (Br. 15) that the Commission's power is limited to prohibiting the "practices about which it filed a complaint," and that it can not require petitioner to append the words "Collection Service" to his own or any trade name on any stationery used in locating or collecting money from delinquent debtors. But "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past," *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473. "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices * * * judicial review is limited * * * to ascertaining whether the Commission made an allowable judgment in its choice of the remedy." *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611-612. In the light of petitioner's deceptive practices shown by the record, the Commission did not abuse its discretion by requiring him to disclose the true nature of his business in any future inquiries for information about delinquent debtors. In so doing the Commission is not affirmatively prescribing "the method of operating a business," as petitioner asserts (Br. 15), but is merely providing an adequate safeguard against continuation of petitioner's past deceptive practices.

CONCLUSION

The petition was not filed in time, the decision below is correct, no question of general importance is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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